Supreme Court, U.S.
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No. 89-1799

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

JEFFREY M. MASSON,
Petitioner,
v.
THE NEW YORKER MAGAZINE, INC.,
ALFRED A. KNOPF, INC., and JANET MALCOLM,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF CERTAIN JOURNALISTS AND ACADEMICS IN SUPPORT OF PETITIONER

Of Counsel:
MICHAEL P. MCDONALD
CENTER FOR INDIVIDUAL RIGHTS
2300 N Street, N.W.
Suite 600
Washington, D.C. 20037
(202) 663-9041

STEWART ABERCROMBIE BAKER *
MALCOLM L. RUSSELL-EINHORN
STEPTOE & JOHNSON
1330 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 429-3000
* Counsel of Record for *Amici Curiae* Journalists and Academics

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QUESTION PRESENTED

Whether, and to what extent, the First Amendment protects the publication of deliberately altered or manufactured quotations that are attributed to and defame a public figure.

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BRIEF *AMICUS CURIAE* OF CERTAIN JOURNALISTS AND ACADEMICS IN SUPPORT OF PETITIONER

A number of journalists and academics familiar with First Amendment jurisprudence respectfully submit this brief *amicus curiae* in support of Petitioner Jeffrey M. Masson. Counsel for *amici*, Steptoe & Johnson and the Center for Individual Rights,[1] have obtained the written consent of Petitioner and Respondents to file this brief. These written consents have been provided to the Clerk of the Court pursuant to Rule 37.

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[1] The Center for Individual Rights is a non-profit, public interest law firm that provides legal representation to deserving individuals and groups in cases raising significant legal policy issues. The Center is incorporated as a 501(c)(3) charitable organization under the Internal Revenue Code.

INTERESTS OF *AMICI CURIAE*

Identification of Amici Curiae

Amici consist of the following individuals:

Peter Collier is a free-lance writer and the co-author, with David Horowitz, of several widely acclaimed books, including biographies of the Rockefeller, Kennedy, and Ford families.

John De Mott is Professor of Journalism at Memphis State University. Before joining the Memphis State faculty in 1980, he taught journalism at Temple University, Northern Illinois University, Northwestern University's Medill School of Journalism, and the University of Kansas. Before becoming an educator, Dr. De Mott served 16 years as a news reporter and editor for the *Kansas City Star and Times.*

Mark Fackler, Ph.D., is Associate Professor of Communications at Wheaton College, Illinois and is the co-author of *Media Ethics: Cases and Moral Reasoning* (3d ed. 1991).

Joseph C. Goulden is the author of 16 non-fiction books. Prior to becoming a full-time writer, Mr. Goulden worked for newspapers for ten years, lastly as Washington bureau chief of *The Philadelphia Inquirer.* Mr. Goulden has received numerous newspaper and literary awards.

William E. Lee, Ph.D., is Professor at the Henry W. Grady School of Journalism and Mass Communication at the University of Georgia. Professor Lee has testified as an expert witness in many trials concerning journalistic practices and has written extensively on press freedom in journals such as *The Supreme Court Review.*

Clark Mollenhoff is Professor of Journalism and Law at Washington and Lee University. A Pulitzer Prize-winning Washington correspondent who has practiced journalism for over 40 years, he is the recipient of numerous First Amendment awards for distinguished report-

ing, including the John Peter Zenger award (U. Ariz., 1962), the William Allen White Memorial award (U. Kansas, 1964), and the National American Legion Fourth Estate award (1965).

Marvin Olasky, Ph.D., is Associate Professor of Journalism at the University of Texas, Austin. He has written several books about the media, including *Prodigal Press* and *Central Ideas in the Development of American Journalism.*

Robert Poole is the publisher of *Reason* magazine, a monthly journal of news and political opinion. Prior to becoming the editor of *Reason,* Mr. Poole worked for 12 years as its editor-in-chief. He is a former syndicated newspaper columnist.

Dwight L. Teeter, Jr., Ph.D., is Professor of Mass Communication at the University of Wisconsin-Milwaukee. A teacher of mass media law, history and writing for 25 years, Dr. Teeter worked for four years as a reporter for newspapers in Iowa and Wisconsin. He is a co-author of *The Law of Mass Communication* (6th ed. 1989).

Emmett Tyrrell, Jr., the author of several books on contemporary politics, is the editor-in-chief of *The American Spectator* magazine and a nationally syndicated columnist with King Features Syndicate.

Nature of Amici's Interest

Amici are seriously concerned about preserving media integrity in the wake of the Ninth Circuit's holding in this case. We believe that the decision below has far-reaching implications for journalists, public figures and the public at large. Permitting writers to deliberately alter or invent quotations is not essential to the operation of a free and effective press. Indeed, journalists who use quotation marks while substituting their voice for the speaker's undermine the public debate that the First Amendment was designed to protect.

The exceptional constitutional protection sought by Respondents makes for bad journalism and bad government. Our expression as journalists and writers depends on our credibility. If we cease to be trustworthy, we will forfeit our authority. We believe that this Court should continue to apply constitutional standards that separate fact from deliberate fiction.

SUMMARY OF ARGUMENT

The Ninth Circuit's novel First Amendment doctrine would allow publishers and writers to intentionally defame a public figure by attributing a false quotation to him, so long as the false quotation is a "rational interpretation" or does not "alter the substantive content" of remarks he actually made. This new standard will not advance First Amendment values. It will undermine them.

I. The marketplace of ideas depends on access to the wide range of views presented in the mass media. The press receives constitutional protection in part because it serves as a conduit for diverse views. But when the press deliberately misquotes public figures it corrupts the marketplace of ideas. By protecting deliberate misquotation, the court of appeals' doctrine will distort the very public debate that the First Amendment is designed to foster.

II. First Amendment interests in self-expression will also be subverted. When a reporter deliberately alters a quotation, he substitutes his voice for that of the speaker, inevitably changing the speaker's message and damaging the speaker's interest in expressing himself. What is more, taking such liberties with a public figure's speech diminishes his ability to tell his side of the story to the press. This strikes at the heart of *New York Times v. Sullivan* and its progeny, which assume that a public figure's access to the press to rebut defamatory falsehoods is an adequate substitute for a defamation suit.

III. A. The Ninth Circuit's test is also unworkable. Deciding which fictions constitute "rational interpretations" is a highly subjective inquiry. In the end, it will breed more jury trials, not fewer. And those trials will encourage precisely what this Court has sought to avoid —efforts to punish litigants for their unpopular views. The lower court's standard will encourage media defendants to attack the victim of their misquotation as having such controversial and unorthodox opinions that almost any words could be put in his mouth without liability.

III. B. Finally, the lower court's novel doctrine is unnecessary. The actual malice standard has adequately protected the press for a generation. Reporters are already shielded from liability for negligent or inadvertent misquotation, or for misquotation resulting from time pressures or other adversity. Protection also extends to the exercise of judgment involved in paraphrasing an ambiguous statement. The deliberate falsification of a quotation requires no such protection, since it harms, rather than helps, the quest for truth.

ARGUMENT

Freedom of speech and freedom of press are inextricably linked. Throughout this country's history, both freedoms have allowed individuals to express themselves freely. In modern society, the press has often served as the only means by which individuals could make their views heard. Without the mass media, their speech would have less value.

To ensure that the inhibiting effects of defamation suits do not silence these diverse voices, this Court has sought to strengthen First Amendment protection of the press. Beginning with *New York Times v. Sullivan*, 376 U.S. 254 (1964), the Court has consistently endorsed a generous zone of security for allegedly libelous statements published about public figures. To prevail, a plaintiff must prove with "convincing clarity," *id.* at 286,

that the defendant published a defamatory falsehood with "actual malice"—that is, with "knowledge that [the statement] was false or with reckless disregard of whether it was false or not." *Id.* at 280.

This constitutional shield offers considerable protection to the Respondents in this case. If the evidence establishes that Respondents misquoted Mr. Masson as a result of carelessness or negligence, no liability will attach. *See Harte-Hanks Communications, Inc. v. Connaughton*, 109 S. Ct. 2678, 2696 (1989). If the evidence shows that they altered a particular quotation solely to render awkward grammar and pauses into readable English, their conduct will also withstand challenge. *Cf. St. Amant v. Thompson*, 390 U.S. 727, 731-33 (1968) (no liability where defendant lacks "serious doubts" as to truth of published statement). They will even prevail if Petitioner's evidence of malice ultimately lacks sufficient weight. *See Bose Corp. v. Consumers Union of America, Inc.*, 466 U.S. 485, 514 (1984); *New York Times*, 376 U.S. at 285-86 (record must establish actual malice with "convincing clarity").

Respondents want more. They want a special rule that would permit the press to deliberately alter or invent quotations so long as the false quotations constitute "rational interpretations of ambiguous remarks" or "do not 'alter the substantive content' of unambiguous remarks." (App. A at A-10-11) (citations omitted).[2] This rule would allow a writer to put his own words in a speaker's mouth as long as the false words are close enough to what the speaker actually said. Under this "close enough" standard, the reporter would be protected even if he deliberately falsified a quotation.

Respondents have invoked the First Amendment on behalf of their proposed new rule; it is fair to ask

[2] Citations designated "App. A at A——" refer to Appendix A filed in this Court by Petitioner with his Petition for Writ of Certiorari.

whether the rule will in fact foster the values embodied in the Amendment. Those values are most frequently identified as, *first*, society's interest in robust and uninhibited public debate, and *second*, individuals' interest in expressing themselves and their views. An examination of both interests suggests that they are better served by a rule encouraging accurate quotations than by a rule allowing the liberal use of false quotations.

I. UNINHIBITED, ROBUST PUBLIC DEBATE IS UNDERMINED BY A RIGHT TO DELIBERATELY ALTER OR INVENT QUOTATIONS

Democracy depends for its success upon citizens having free access to a broad range of ideas. Such access is "essential to the common quest for truth and the vitality of society as a whole." *Bose Corp. v. Consumers Union*, 466 U.S. at 503-04.

In today's world, access to the marketplace of ideas means access to the mass media. For, as this Court has recognized, "[i]nstead of acquiring information . . . by word of mouth . . . people now acquire it chiefly through the print and electronic media." *Richmond Newspapers v. Virginia*, 448 U.S. 555, 572-73 (1979). The press plays a unique role in "informing and educating the public, offering criticism, and providing a forum for discussion and debate." *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 781 (1978). In its everyday functions, a free press brings the public the words and ideas of thousands of different individuals.

The press therefore is protected under the First Amendment not only because it sets forth the views of publishers and writers, but also because it offers "the widest possible dissemination of information from diverse and antagonistic sources. . . ." *Associated Press v. United States*, 326 U.S. 1, 20 (1945). When those of us who write for the press are sued for what we have written, we bring to court with us not just our own rights, but the First Amendment rights of all the other speakers who depend

on us to relay *their* views. This constitutional protection is necessary to keep open

> an important outlet for the promulgation of information and ideas by persons who do not themselves have access to publishing facilities—who wish to exercise their freedom of speech even though they are not members of the press.

New York Times, 376 U.S. at 266 (citations omitted).

Those of us who are columnists and reporters set great store by our own views, but it would be the height of arrogance to claim that the handful of men and women who publish or write for the mass media can, by themselves, provide the wide range of views and voices on which democratic government hinges. Indeed, the press' greatest constitutional victory, *New York Times v. Sullivan*, protected a newspaper for publishing not its own but someone else's speech, in the form of paid political advertising.

When the press distorts the contest of ideas in the marketplace by publishing false statements of fact, this Court has held, it betrays public confidence and forfeits this right to special constitutional treatment; this is because "false statements of fact harm both the subject of the falsehood *and* the readers of the statement." *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 776 (1984) (emphasis in original). Such falsehoods do not foster the search for truth; rather, they "interfere with [this] truth seeking function. . . ." *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 52 (1988). *See also Rosenblatt v. Baer*, 383 U.S. 75, 94 (1966) ("[T]he poisonous atmosphere of the easy lie can infect and degrade a whole society.") (Stewart, J., concurring).

If a deliberately false statement of fact has "no constitutional value," *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974), falsified quotations lie even further beyond the pale. Publishers and reporters who deliberately invent or alter quotations are misrepresenting

the views of a man or woman whose right to speak is every bit the equal of theirs. *Cf. Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 773 (1985) (press not entitled to greater First Amendment privileges than citizens generally). *Accord, Bellotti*, 435 U.S. at 782 n.18. The "close enough" standard—and the falsified quotations it will encourage—are likely to distort the very public debate the First Amendment is designed to protect.

II. A RIGHT TO DELIBERATELY ALTER OR INVENT QUOTATIONS INFRINGES UPON THE INTEREST OF PUBLIC FIGURES IN EXPRESSING THEMSELVES FREELY, IN WORDS OF THEIR OWN CHOOSING

The First Amendment also serves to protect each individual's interest in self-expression. To journalists, it is this aspect of the First Amendment that strikes the most personal chord. Journalists express themselves in even the most trivial or factbound police-blotter story. The words we choose, the facts we emphasize—all are part of our craft. Thus, Janet Malcolm has an interest in self-expression even when she writes nonfiction. But her interest, and that of the corporate Respondents, is no more or less weighty than Jeffrey Masson's own interest in expressing himself. *Cf. Saxbe v. Washington Post Co.*, 417 U.S. 843, 857 (1974) ("neither any news organization nor reporters as individuals have constitutional rights superior to those enjoyed by ordinary citizens") (Powell, J., dissenting). And that interest is entirely defeated if Jeffrey Masson's words can be replaced at will by Janet Malcolm's, because to change his words is inevitably to change his message. *See Cohen v. California*, 403 U.S. 15, 26 (1971) ("[W]e cannot indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process.").

Nor is it necessary to extinguish Jeffrey Masson's self-expression in order to save Janet Malcolm's. She has

many ways to express herself. If she believes Jeffrey Masson is an intellectual gigolo, she can say so, and she will be fully protected by current law. She loses this protection only if she substitutes her words for Masson's while pretending to quote him. First Amendment values support a rule that preserves both Masson's and Malcolm's right to speak—using their own voices, not someone else's.

One further factor should be weighed in this balance. Masson is a public figure under *New York Times v. Sullivan*. *See Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967). Because of this status, he receives less protection against libel and falsehood than would more private men and women. His protection is limited precisely because this Court assumes that a public figure has special access to the media and can more easily rebut defamatory falsehoods by conveying his or her own version of events to the public. *See Gertz v. Welch*, 418 U.S. at 344. By allowing Janet Malcolm and others to rewrite Masson's words when he tells his story, however, the lower court's doctrine puts at risk the unique self-help remedy that is the foundation of *New York Times v. Sullivan* and its progeny.

III. THE EXCEPTIONAL PROTECTION SOUGHT BY RESPONDENTS IS BOTH UNWORKABLE AND UNNECESSARY

Even if the lower court's rule were not so profoundly opposed to First Amendment values, it should be rejected. First, it requires an unworkable and subjective assessment. Second, it is unnecessary.

A. Respondents' Proposed Standard is Unworkable

The whole point of quotation marks is to indicate that the reporter has not engaged in interpretation. *See* M. Charnley & B. Charnley, *Reporting* 248 (4th ed. 1979) ("Quotation marks mean literally that the words they

enclose are exactly as the source gave them—verbatim.").[3] But the lower court's formulation permits journalists—and requires judges—to decide whether a false quotation is "close enough" to the speaker's actual words. This formula begs two questions.

The obvious difficulty is deciding how close is close enough. As Judge Kozinski pointed out below, the measurement can take place on a level of generality that permits wholesale fictionalization:

> What the court is saying, in effect, is that if you make statements that could reasonably be construed as boastful or arrogant (or callous or stupid or reflecting any other trait of character or intellect) the reporter may attribute to you any other statement reflecting that same trait.

(App. A at A-39).

Equally uncertain is which of the speaker's actual words may be used to justify a false quotation. Must the quote be a rational interpretation of things the speaker actually said in the interview? Or may the reporter rely on statements made in other interviews, at other times and in other cities, as the court of appeals seems to have decided below? If later interviews are grist for the mill, why not statements reported by other interviewers? And what will keep this from becoming a hall of mirrors, in which one reporter's fictions are invoked to justify another's?

No principled standard resolves these uncertainties. Deciding which interpretations are sufficiently "rational" and what evidence the reporter is entitled to invoke are matters of judgment, and inherently subjective judgment at that. Such a subjective analysis is especially inappro-

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[3] For the convenience of the Court, *amici* have lodged with the Clerk of the Court this source and a variety of other materials reflecting current standards of practice regarding quotation in the journalistic profession.

priate in a First Amendment case. *See Hustler Magazine v. Falwell*, 485 U.S. at 55 (1988) ("inherent subjectiveness" renders proposed "outrageousness" standard for actionable falsehoods defective).

Despite the lower court's insistence that this case need not go to a jury, the fact is that the vague standard accepted below could only be applied by a jury or other fact-finder. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986) (reaffirming role of jury in weighing evidence and drawing inferences in libel cases). But this Court has several times expressed concern that juries will not fairly find the facts in cases involving unpopular speakers or unorthodox ideas. *See, e.g., Gertz v. Welch*, 418 U.S. at 349-50; *New York Times*, 376 U.S. at 294-95 (Black, J., concurring). That danger is indeed posed by the lower court's test—though it is Jeffrey Masson, not Janet Malcolm, who would most likely be punished by a jury for holding unorthodox views.

The "close enough" doctrine would invite Janet Malcolm's lawyers to harp relentlessly (as indeed they already have) on all of Jeffrey Masson's most controversial and offensive statements. Everything he said in 40 hours of interviews would be combed and picked over and selectively presented—all in an effort to suggest that his views are so alien and peculiar that even Malcolm's most prejudicial misquotations are consistent with his character. Masson and his views would be at the center of the case, and the jury would be invited—openly or covertly—to punish him for them.

B. Respondents' Proposed Standard is Unnecessary

There is no need for courts and juries to enter this thicket. For a generation, the actual malice test has reconciled the competing interests of a free press and individual speakers in a variety of contexts. In that time, successful suits for falsifying quotations have been notable principally for their rarity. There are two reasons for this.

First, the press is already protected from liability for inadvertent or negligent misquotations by the requirement that a libel plaintiff prove reckless or knowing conduct by clear and convincing evidence. *See Harte-Hanks*, 109 S. Ct. at 2696. This standard ensures that unreliable sources, incomplete information, and time deadlines are taken into account in giving the press "breathing space" to print false statements. *See, e.g., Curtis Publishing v. Butts*, 380 U.S. at 158-59 (immediacy of dissemination factor in determining actual malice); *St. Amant v. Thompson*, 390 U.S. at 732 (recklessness may only be found where there are "obvious reasons to doubt veracity" of information on which false statements are based). Only conduct amounting to "purposeful avoidance of the truth," *Harte-Hanks*, 109 S. Ct. at 2698, falls outside the First Amendment's reach.

It will be the rare case indeed where a plaintiff can offer sufficient evidence to permit a finding that a defendant knew a quotation was false. Plaintiffs already face a considerable challenge in meeting this burden with "convincing clarity." *See Gertz v. Welch*, 418 U.S. at 342 ("Plainly many deserving plaintiffs, including some intentionally subjected to injury, will be unable to surmount the barier of the *New York Times* test.").

Second, and equally important, standard journalistic practice also protects reporters and publishers. Many reporters rely on video or audio tapes to verify the accuracy of the quotes they intend to print.[4] Others actu-

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[4] Whatever its value in a parade of horribles, there is no realistic possibility that journalists will be held liable for "cleaning up" quotes by removing the speaker's hesitations, stammerings or other syntactical lapses. This is, in fact, not as common a practice among reputable journalists as one might suppose. Many of us have learned to clean up with ellipses and brackets, tools that tell the reader that an editor has been at work. Even if that were not true, it is hard to imagine the public figure who would sue a reporter for improving his grammar—and harder still to imagine the jury that would find damages in such a suit. Reporters are at risk only if

ally call the subject to verify quotations (and, unlike the *New Yorker* in this case, pay attention when the source denies the quote).

Where these practices do not suffice, the writer still need not choose between silence and a lawsuit. Any professional reporter worthy of the name knows how to convey the gist of what he heard without resorting to fictional quotations—either by limiting quotation to verifiable phrases or by paraphrasing what was said. *See, e.g.*, J. Highton, *Reporter* 50 (1978) ("Don't fake quotes. If you do not catch a full quote, put quote marks around only the words you do catch"); J. Olen, *Ethics in Journalism* 100-01 (1988) ("If the speaker's actual words are completely unusable . . . the reporter can always resort to indirect quotation or a combination of indirect and direct, putting quotation marks around only usable phrases.").

By choosing to paraphrase—by making clear to the reader that some interpretation has occurred—the reporter gains the advantage of broad First Amendment protection. This Court created breathing space for the difficult choices that must be made when paraphrasing ambiguous statements in *Time, Inc. v. Pape*, 401 U.S. 279 (1971). But the *Pape* Court provided protection precisely because "departure from full direct quotation of the words of the source, with all its qualifying language, inevitably confronts the publisher with a set of choices." *Id.* at 286. Implicit in the *Pape* Court's holding is the view that "full direct quotation" ought not to require similarly difficult choices—or corresponding constitutional protection.[5]

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their "clean-up" actually distorts the speaker's meaning in a damaging way, and even then the distortion must reflect actual malice.

[5] It is therefore completely misleading to imply, as did the Ninth Circuit, that a journalist faces descriptive challenges in transmitting a speaker's words through direct quotation, *see Bose v. Consumers Union*, 466 U.S. at 512, and that those words invariably "'bristl[e] with ambiguities'" (App. A at A-11) (*quoting id.* (*quoting Pape*, 401 U.S. at 290)). As the dissent below pointed out, although a person's *meaning* may be ambiguous, there is usually no ambiguity about the *words* he or she uttered (App. A at A-54).

The existing constitutional protection for paraphrasing means that the lower court's rule will not affect the content of news stories, only the manner in which they are presented. No doubt, some reporters would rather make up quotes than engage in paraphrasing. Quotations are more vivid, more forceful—but only because the audience believes that it is hearing from the speaker directly, without an intermediary. When that assurance is gone, quotations will quickly lose their power. Janet Malcolm and others like her should not be free to hijack this powerful form of expression and drain it of its power in a way that will ultimately deprive all journalists of a valuable tool of the trade.

CONCLUSION

The judgment below should be reversed.

Respectfully submitted,

Of Counsel:
MICHAEL P. MCDONALD
CENTER FOR INDIVIDUAL RIGHTS
2300 N Street, N.W.
Suite 600
Washington, D.C. 20037
(202) 663-9041

STEWART ABERCROMBIE BAKER *
MALCOLM L. RUSSELL-EINHORN
STEPTOE & JOHNSON
1330 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 429-3000
* Counsel of Record for *Amici Curiae* Journalists and Academics

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